

**DUE PROCESS HEARING PANEL
MISSOURI STATE BOARD OF EDUCATION
DEPARTMENT OF ELEMENTARY AND SECONDARY EDUCATION**

,)
by her mother,)
,)
)
Complainants,)
)
vs.)
)
CARL JUNCTION R-I)
SCHOOL DISTRICT,)
)
Respondent.)

DECISION

This is the final decision in a “due process” proceeding under the federal Individuals with Disabilities Education Act (IDEA) and Missouri state law.

THE PARTIES

The Student is

Her mother is:

The Respondent is:
Carl Junction R-I School District
206 S. Roney
Carl Junction, MO 64834-0004

The school district was represented by:
Virginia Fry
Blackwell, Sanders, Peper, Martin
Suite 1900
901 St. Louis Street
Springfield, MO 65806

HEARING OFFICERS

Kenneth M. Chackes	Hearing Chairperson
Rand Hodgson	Hearing Panel Member selected by parents
George Wilson	Hearing Panel Member selected by school district

RELEVANT DATES

Request for due process hearing: September 6, 2000

Date of hearing: November 9, 2000

Date of Decision: September 19, 2001

Explanation of deviation from 45 day time-line:

On September 26, 2000 the hearing chairperson notified the parties that under the law, the hearing must be held and a written decision completed and mailed to the parties by October 23, 2000. On October 3, 2000, the school district submitted a written request for an extension of that deadline to November 22, 2000. The parent informed the chairperson that she did not object to that request. The chairperson granted the district's request to extend the deadline to November 22, 2000.

DECISION

This is the final decision of the hearing panel in an impartial due process hearing pursuant to the IDEA, 20 U.S.C. §1415(f) (1997), and Missouri law, §162.961.3 RSMo.

STATEMENT OF ISSUES

The following issues were taken from the Proposed Resolutions submitted by the parent on October 30, 2000, approximately ten days in advance of the hearing. The parent also presented a Due Process Hearing Request Notice Form on September 6, 2000, which contained a great deal more detail, but the panel believes that the statement of issues set out below covers all of the issues raised by the parent at the hearing.

Several of these issues were resolved by the parties at or before the beginning of the hearing. The parties' agreements are contained in the hearing transcript and will be indicated below and made a part of this decision.

1. Did the school district fail to provide the parent with required written progress reports?
2. Was the student wrongfully deprived of occupational therapy in the summer of 2000?
3. Is the student entitled to take all district-wide achievement tests?
4. Is the parent entitled to reimbursement for transportation to pre-school?
5. Was the student entitled to receive, as part of her IEPs, the physical therapy, occupational therapy, and speech/language therapy that she received for the three past school years and this year at the rehabilitation center ("Brady Building") in Joplin?
6. Is the student entitled to six weeks of home instruction for math?
7. Was the student improperly denied the IEP service of concepts and resource for 60 minutes per week for five months during the 1999-2000 school year?
8. Is the parent entitled to a written apology for:
 1. Tampering with the student's IEPs
 2. Violating the student's privacy
 3. Educational neglect

9. Did the district fail to properly make corrections and add service times on IEPs?
10. Is the district required to follow the parents' manual for resolution conferences?

FINDINGS OF FACT

The parties agreed to a resolution of the issues in paragraphs 1, 2, 3, 4, 6 (withdrawn), and 10, listed above. These findings of fact, therefore, will address only the evidence related to the issues to be decided by the panel.

1. The student is a female who was born on . She resides with her mother in Carl Junction, Missouri.
2. The student's mother testified that her daughter was served by the First Steps program since age one, and has received occupational, physical and speech/language therapies since that time at the Rehabilitation Center of the St. John's Regional Medical Center in Joplin; referred to as the "Brady Building." Mother's testimony.
3. The mother testified that the Brady services are educational; the language therapy was for improving memory and the occupational therapy was for writing. The student was referred to St. John's by her doctor and the therapies have been paid by medicaid. Mother's testimony. The district's former Special Education Director, Joe Gassaway, testified that he did not believe those therapies were educational. Gassaway.
4. The mother testified she requested each of those services from the school district, starting when the student was in pre-school. She said she was told by the district that physical therapy was not needed, and that the student would receive more benefit by continuing to receive Physical therapy at the Brady Building. When the student received occupational

therapy in kindergarten of 30 minutes per week, the mother testified she was told that was all the school could provide because of the therapist's schedule.

5. The parent initially sought services for the student from the district in August 1997, when she was approximately years, months old. Ex. 15.¹ The district decided at that time to "evaluate in the areas of health/motor, language, intellectual and achievement." *Id.* The mother testified she provided the district with evaluations from the regional center and the Brady Building. Mother's testimony.
6. The district's 1997 evaluation indicates it was based on reports from the parent and from the Joplin Regional Center. Ex. 13. The Diagnostic Summary indicates the student was referred by her parent because she was then receiving language therapy. *Id.* In the health/motor area the summary states:

[The student] has a diagnosis of spina bifida and hydrocephalus, for which she has a shunt. . . . [She] has braces for both legs, but doesn't tolerate them well. She also has a walker. She recently had hamstring and heelcord surgery. She moves about by crawling, using her walker, or by wheelchair. [She] is working on developing upper body strength and rotating her trunk while reaching for objects. Her motor skills are somewhat delayed. [She] is catheterized four times a day at home. Toilet training is not appropriate at this time.

Id. In the area of communication, the diagnostic summary states the student "has been receiving speech/language therapy from St. Johns' Hospital through contract with the Joplin Regional Center. She is beginning to us[e] multiple word sentences and ask questions." *Id.* No other delays or concerns were noted by the district and it did not perform assessments for occupational or physical therapy. *Id.* The district determined

¹ All exhibits were presented as joint exhibits by the parties.

the student was eligible for early childhood special education, “based on expected regression which would occur if previous early intervention services were terminated.”

Id.

7. The district’s initial Individualized Educational Program (IEP) for the student, also developed in August 1997, contains most of the information from the Diagnostic Summary and also indicates her “fine motor skills are somewhat delayed.” Ex. 11. The IEP indicates the student would receive self-contained special education instruction for 725 minutes per week and 30 minutes per week of language therapy. *Id.* The student’s goals and objectives for her first year of pre-school were in the areas of language and fine motor skills. *Id.* The Mother testified that she told the district that 30 minutes of language therapy would not be enough, but the district said that was all she needed. The district provided no occupational or physical therapy during that year. *Id.*; Mother’s testimony.
8. The student’s IEP for her second year of pre-school, developed in August 1998, indicates her fine motor skills have improved, “but still needs more improvement.” Ex. 12. The district continued to provide her 725 minutes per week of early childhood special education services for that year, but discontinued the language therapy. *Id.* The IEP states: “It is the consisence (sic) of the team to drop language goals at this time. She is receiving speech at St. Johns rehabilitation center.” *Id.* Mr. Gassaway attended that IEP meeting but could not explain why the language therapy was dropped. Gassaway. Like the first year, this IEP also contained goals and objectives in the fine motor area but provided no occupational therapy or Physical therapy. Ex. 12.

9. In April 1999 the district completed a kindergarten screening for the student indicating possible delays in motor skills and language development. Ex. 17.
10. In May 1999 the district evaluated the student's progress on her IEP objectives, and reported that she mastered all of them but the fine motor objective involving writing. Ex. 12.
11. The mother provided the district with 1999 evaluations from the Brady Building. Mother's testimony; Gassaway; Exs. 36, 40. The occupational therapy evaluation shows she was working on daily living skills and writing. Ex. 36. The language evaluation indicates the "[t]herapy focused on increasing auditory comprehension of concepts and retrieval of information." Ex. 40. The mother testified that the student would not be writing now if not for St. John's occupational therapy services. Mother's testimony. The mother testified she again requested Physical therapy from the district, but Mr. Gassaway told her she would receive better services at Brady. Mother. Mr. Gassaway denied saying that. Gassaway.
12. When the student started kindergarten in late August 1999 her previous IEP from pre-school, written August 28, 1998, had expired. Ex. 12; Mother's testimony; Gassaway. The next IEP was written by the district on September 29, 1999, approximately one month after the previous IEP expired and a month after the start of kindergarten. Exs. 2, 3. The Special Education Director could not explain that delay but testified he would consider the previous IEP to remain in effect. Gassaway.
13. At or before the beginning of kindergarten the district decided to evaluate the student for occupational therapy for the first time. Exs. 24, 25, 29. The September 1999 IEP does not indicate the date of the last diagnostic evaluation, but an IEP written in January 2000

indicates an evaluation was completed on October 19, 1999. Ex. 6. Thus, the student went from pre-school to kindergarten with no new evaluation and no new IEP.

14. The student's kindergarten IEP, developed September 29, 1999, indicates her disabilities were in the areas of language and "OT." Exs. 2-3. There are two versions in the record of the services page of this IEP. *Id.*, page 4. The testimony established that the services agreed to by the IEP team are those set forth in Exhibit 3, which calls for language therapy of 30 minutes per week, "concepts/resource" services of 60 minutes per week, and occupational therapy of 30 minutes per week. Ex. 3, page 4; Mother's testimony; Costly testimony; Gassaway testimony. At the bottom of the services page the IEP incorrectly indicates the student would receive "pull out" services, out of her general kindergarten classroom, for a total of 90 minutes per week, rather than 120 minutes as the above figures would indicate.
15. At the September 1999 IEP meeting the mother initially resisted but then agreed to the 60 minutes per week of pull out to resource class for work on concepts. Mother's testimony; Costly testimony. She later met with Mr. Gassaway who offered the alternative of before-school resource time, since the student only attended kindergarten in the afternoons. *Id.* Student went to resource before school only two or three times. *Id.* After she stopped attending, no other resource services were provided under that IEP, although it still called for 60 minutes of resource per week. *Id.* The mother claimed that page 4 of Exhibit 2 was "forged" by Mr. Gassaway after he learned the resource service wasn't provided. The panel does not find that page was a forgery but believes Mr. Gassaway's testimony that it was probably a proposed IEP page that inadvertently was inserted into the school's copy of the IEP. Gassaway.

16. After the Special Education Director, Mr. Gassaway, discovered that the resource services had not been provided the IEP team met again in January 2000 and revised the IEP. Exs. 5, 6. An Advocate accompanied the mother to that meeting and testified that the mother asked about Physical therapy at that meeting. Krause testimony. The Advocate testified that Mr. Gassaway said it was a good idea and that the student needed the services, but that taking her to Joplin, to the Brady Building, was better for her than providing Physical therapy at school. *Id.* The Advocate also testified that at that IEP meeting Mr. Gassaway agreed to provide 60 minutes of concepts/resource, but did not include it on the final draft of the IEP, which was written after the meeting. *Id.* The services indicated on the January IEP are language therapy and occupational therapy. Ex. 6.
17. A third IEP was developed near the end of the student's kindergarten year, on May 4, 2000. Ex. 8. On May 4 the team met and wrote an IEP providing language and occupational therapy. *Id.* Mr. Gassaway testified that the IEP team agreed at that time to add physical therapy services, as soon as a physical therapy evaluation was completed. Gassaway. On approximately May 24 or 26 Mr. Gassaway added the physical therapy services when the district got the results of Physical therapy evaluation. *Id.*; Ex. 8.
18. Since late May 2000, the student's IEPs have included all three therapies, language, occupational, and physical. Exs. 9, 42.
19. The district did not provide any detailed explanation as to how and why it determined that the student would have an appropriate education without those therapies, during the years they were not provided, prior to May 2000. The only evidence from the district on that point was the testimony of its Special Education Director, Mr. Gassaway, who expressed

the opinion that the services provided at the Brady Building were not educational.

Gassaway.

20. The mother complains of tampering with and errors on IEPs. The district did commit procedural errors in the development and writing of IEPs. On several IEPs words, numbers or names were crossed out and replaced without anyone's initials or the date of the change being placed by the modification. The IEPs contain numerous mathematical errors, such as numbers of minutes of service being added incorrectly and the percentage of time in different services being incorrectly computed. As noted above with respect to the September 29, 1999, IEP, a page was included specifying services that were not agreed to at the IEP meeting, and the number of minutes of services agreed to for that IEP were not fulfilled. The mother presented evidence that district employees signed IEPs even though they were not present. The district also added the physical therapy services to the May 4, 2000, IEP without reconvening an IEP meeting. We do not believe the district intentionally tampered with IEPs in order to deprive the student or the parent of any legal rights, but the district did not follow the procedural requirements of the IDEA and the Missouri State Plan in the development and writing of IEPs.
21. The evidence presented by the mother regarding transportation to the Brady Building for her therapies is that she went twice a week and each round trip was 30 miles. Mother's testimony. That results in a total of 3120 miles per year. The mother also testified that she believed the reimbursement rate from the school district for mileage was 24 cents per mile for 1997-98, 26 cents for 1998-99, and 28 cents for 1999-2000 and this year.

CONCLUSIONS OF LAW

ISSUE NUMBER 5

Was the student entitled to receive, as part of her IEPs, the physical therapy, occupational therapy, and speech/language therapy that she received for the three past school years and this year at the rehabilitation center (“Brady Building”) in Joplin?

Reimbursement to a parent for the expenses of providing special education or related services for her child is justified if: (1) the school district failed to offer an appropriate educational program, and (2) the private program obtained by the parent provided an appropriate education, even if the private program has not been formally recognized as meeting the educational standards of the state. *Florence County School District v. Carter*, 510 U.S. 7 (1993).

The first determination is whether the district offered a free appropriate public education (“FAPE”). The FAPE requirement involves both a procedural and a substantive component. As stated by the United States Supreme Court in the *Rowley* case:

First, has the [district] complied with the procedures set forth in the Act? And second, is the individualized educational program developed through the Act’s procedures reasonably calculated to enable the child to receive educational benefits?

Board of Education v. Rowley, 458 U.S. 176, 206 (1982).

For the student’s first year in pre-school, 1997-98, the school district determined she was eligible based upon the outside evaluations from St. John’s, where the student was receiving physical, occupational and speech/language therapy. The district noted in its diagnostic summary and the present levels of performance section of the student’s IEP that she had delays in the areas of gross and fine motor skills and language, and that “regression . . . would occur if previous early intervention services were terminated.” Yet the only therapy the district provided the student that year was language. The IEP contains goals and objectives relating to fine motor

skills, for which occupational therapy could have been appropriate, but district did not conduct an assessment to determine if the student required either occupational or physical therapy. According to the United States Court of Appeals for the Eighth Circuit, which governs the federal courts in Missouri: “At the administrative level, the District clearly had the burden of proving that it had complied with the IDEA.” *E.S. v. Independent Sch. Dist. No. 196*, 135 F.3d 566, 569 (8th Cir. 1998). Since the district did not evaluate the student’s need for occupational or physical therapy or explain in any detail why those services were not provided, we find the district’s failure to provide those therapies deprived the student of an appropriate education. The mother testified and the documents from St. John’s show that the services the student received at the Brady Building provided educational benefit. The district did not offer any evidence to the contrary other than its general assertion that the services were not educational in nature. We find, therefore, that the mother is entitled to reimbursement for transporting the student to the Brady Building for occupational therapy and physical therapy for the 1997-98 school year.

For the student’s second year of pre-school, 1998-99, the district provided none of the therapies she was receiving at the Brady Building. The district dropped the language therapy, with no explanation other than perhaps the statement that the student was receiving those services at St. John’s. The district still provided no physical or occupational therapy, although it had not evaluated the student for those services and her IEP continued to contain goals in the fine motor area for which occupational therapy would have been appropriate. Thus, for the same reasons as stated with respect to the 1997-98 school year, we find that the mother is entitled to reimbursement for transporting the student to the Brady Building for all three therapies, language, occupational and physical, for the 1998-99 school year.

When the student started kindergarten in the 1999-2000 school year, the district failed to develop a new IEP until at least a month had gone by (September 29, 1999), although the previous IEP expired around the beginning of that school year (August 28, 1999). That is a serious procedural and substantive violation and the mother is entitled to reimbursement for transportation for all three therapies for that month. By late September 1999, however, the district had completed an occupational therapy evaluation and developed an IEP which provided the student with both language and occupational therapy. The district still failed to assess the student for physical therapy until late May 2000. When it finally did so, the district found the student was eligible for that service and began to provide it. Because the district failed to assess the student for physical therapy until May 2000, and failed to offer any evidence to explain why it was not appropriate to provide that service earlier, we find the mother is entitled to reimbursement for transportation for physical therapy services from September 30, 1999 until the district began to provide those services on May 26, 2000, a period of eight months.

We do not believe the mother is entitled to reimbursement for all of the transportation expenses she incurred while she continued to take the student to the Brady Building for services once the district started to provide those services. The mother testified that she believed her daughter needed more services than the district was willing to offer, but we conclude that once the district conducted the proper evaluation and determined in an IEP meeting to provide the amount of therapy recommended by the therapist, the district complied with the procedural requirements of the IDEA. For that reason and because the mother provided no evidence that the amount of services provided by the district or that the goals and objectives related to those services were inadequate to provide the student with meaningful educational benefit, we cannot

conclude that the district failed to provide appropriate services during the times that it did provide language, occupational and physical therapy.

The evidence regarding the mileage to the Brady Building for the therapies does not allow for a precise calculation for reimbursement. The mother made two trips per week, but it is not clear which therapies were provided on each trip. We conclude that a fair and reasonable reimbursement should be computed based on the fact that the mother drove 3120 miles per year and dividing that number by the three therapies, so that for a year of each therapy the mother drove 1040 miles per year. When we award reimbursement for partial years we divide that number by 12, for 87 miles per month for each therapy. The following table reflects our calculations.

Time Period	Therapies	Miles	Rate	Total
1997-98	PT & OT	$1040 \times 2 = 2080$.24	\$499
1998-99	PT, OT & LT	$1040 \times 3 = 3120$.26	811
9/99	PT, OT & LT	$87 \times 3 = 261$.28	73
10/99 - 5/99	PT	$87 \times 8 = 696$.28	195
TOTAL				\$1578

ISSUE NUMBER 7

Was the student improperly denied the IEP service of concepts and resource for 60 minutes per week for five months during the 1999-2000 school year?

The IEP team on September 29, 1999, provided that the student would receive 60 minutes per week of resource services. After the IEP was written the district offered to allow the student to receive those resource services in the morning, before her afternoon kindergarten session. The student took advantage of that offer two or three times, but the mother then was unable to keep taking the student to school in the morning. We do not find that the district willfully deprived the student of those resource services, but it did fail to provide a service that was determined to be necessary by the IEP team. We conclude that the district should have either provided the service as specified in the IEP, in the afternoon, as a pull out service, or, if it did not believe the service was necessary it should have reconvened the IEP team to remedy the situation. Not until four months passed did the district develop a new IEP that removed the resource service altogether. The student is entitled to compensatory education services for the 14 weeks that the resource services were not provided, from September 29, 1999 until January 24, 2000. At 60 minutes per week, the student lost a total of 840 minutes, for which compensatory services must be provided. *Miener v. Missouri*, 800 F.2d 749 (8th Cir. 1986).

ISSUE NUMBER 8

Is the parent entitled to a written apology for:

1. Tampering with the student's IEPs
2. Violating the student's privacy
3. Educational neglect?

Although the student's IEPs do contain cross-outs and changes that were not initialed, mathematical errors, and in one instance a service page that indicated services that were not agreed to at the IEP meeting, we do not find that the district intentionally tampered with the student's IEPs.

The panel ruled unanimously during the hearing that it did not have jurisdiction over the mother's claim that the student's privacy rights were violated by the disclosure to another parent of information about the services the student was receiving. Such a claim can only be brought under the Family Rights and Privacy Act (FERPA), 20 U.S.C. § 1232(g); 34 C.F.R. Part 99. Missouri State Plan, page 23 (1996).

This panel could only hear a claim of educational neglect if it amounted to a violation of the students rights under the IDEA or Missouri State Law regarding special education. We have dealt with those issues above and will provide appropriate relief for the violations we found. We do believe an apology is an appropriate remedy.

ISSUE NUMBER 9

Did the district fail to properly make corrections and add service times on IEPs?

As stated above, we do not find that the district violated any legal rights of the student in the way it made corrections and added service times on IEPs.

CONCLUSION AND ORDER

Based on the findings of fact and conclusions of law, and the agreements of the parties as to certain of the issues, we make the following order on each of the issues raised by the parent:

1. Did the school district fail to provide the parent with required written progress reports?

By agreement of the parties, the district shall provide the parent with written progress reports at least quarterly.

2. Was the student wrongfully deprived of occupational therapy in the summer of 2000?

By agreement the district shall provide occupational therapy as an extended school year service during the summer of 2001.

3. Is the student entitled to take all district-wide achievement tests?

By agreement the student shall be entitled to take all district-wide achievement tests subject to the adaptations and modifications that will be determined by the IEP team.

4. Is the parent entitled to reimbursement for transportation to pre-school?

By agreement the district shall reimburse the parent \$222.36 for transportation to pre-school.

5. Was the student entitled to receive, as part of her IEPs, the physical therapy, occupational therapy, and speech/language therapy that she received for the three past school years and this year at the rehabilitation center (“Brady Building”) in Joplin?

The panel concludes that the parent is entitled to receive some of the reimbursement she sought for transportation. Specifically the district shall pay the parent \$1578.

6. Is the student entitled to six weeks of home instruction for math?

The parent withdrew that issue from the hearing.

7. Was the student improperly denied the IEP service of concepts and resource for 60 minutes per week for five months during the 1999-2000 school year?

As stated above, the panel concludes the student was improperly denied those services for a four month period. As a result, the district shall provide compensatory services of 840 minutes of resource services.

8. Is the parent entitled to a written apology for:

1. Tampering with the student’s IEPs
2. Violating the student’s privacy
3. Educational neglect?

The panel does not find the parent is entitled to an apology. In addition, we do not have jurisdiction to rule on the privacy issue.

9. Did the district fail to properly make corrections and add service times on IEPs?

The panel does not find any violation of rights under this issue.

10. Is the district required to follow the parents' manual for resolution conferences?

By agreement the district shall follow the provisions of the procedural safeguards for resolution conferences.

Dated: November 22, 2000

Kenneth M. Chackes
Chairperson

signature attached
Rand Hodgson
Hearing Officer

The decision of Hearing Officer George Wilson, concurring in part and dissenting in part, is attached.

Copies of this Decision will be mailed to the parties on this date, by certified mail, return receipt requested.